A

KOMALATAH GUNASEKARAN

lwn.

NAGAPPAN RAMASAMY

B

MAHKAMAH TINGGI MALAYA, JOHOR BAHRU
AZAHAR MOHAMED PK
[SAMAN PEMULA NO: 24-3380-2005]
10 JULAI 2006

C ***UNDANG-UNDANG KELUARGA:*** *Kanak-Kanak - Penjagaan - Permohonan ibu - Perkahwinan kuil tidak didaftarkan di bawah Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 - Sama ada anak dianggap tak sah - Sama ada Akta 1976 dan Akta Penjagaan Kanak-Kanak 1961 tidak terpakai - Sama ada mahkamah*
D *tidak mempunyai bidangkuasa untuk memutuskan permohonan - Sama ada ibu mempunyai remedi memulakan prosiding wardship*

Plaintif ibu telah memohon untuk mendapat hak penjagaan, kawalan dan pemeliharaan anaknya Piraveen. Isunya ialah sama
E ada mahkamah mempunyai bidangkuasa untuk memutuskan permohonan tersebut sedangkan perkahwinan kuil di antara plaintif dengan defendan tidak didaftarkan di bawah Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta 1976').

F **Diputuskan (menolak permohonan plaintif dengan kos):**

(1) Menurut undang-undang, perkahwinan ikut adat di antara plaintif dan defendan di anggap tak sah dan wajar tidak diiktirafkan kerana ianya tidak didaftarkan di bawah Akta
G 1976. Dari itu, Piraveen yang dilahirkan dari hasil perhubungan di antara plaintif dan defendan adalah di anggap anak tak sah tarafnya. Akta Penjagaan Kanak-Kanak 1961 (Akta 1961) tidak terpakai kepada anak tak sah taraf. Maka, mahkamah tidak mempunyai bidangkuasa untuk
H memberi perintah penjagaan, kawalan dan pemeliharaan di bawah Akta 1961. Akta 1976 juga tidak terpakai kerana perkataan "anak" di dalam ss. 88 dan 90 Akta 1976 merujuk kepada "anak" dari perkahwinan yang didaftarkan di bawah Akta tersebut. Sungguhpun Akta 1961 dan Akta 1976 tidak
I terpakai kepada kanak-kanak yang tak sah, namun ini tidak bermakna bahawa plaintif langsung tidak mempunyai remedi.

Plaintif masih boleh memulakan prosiding wardship bagi membolehkan mahkamah memutuskan permohonan plaintif sebagai ibu biologi Piraveen untuk mendapat hak penjagaan. (perenggan 4, 7, 9 & 11)

Kes-kes yang dirujuk:
Amarapathi Periasamy v. Muniandy [2005] 4 CLJ 264 CA ***(dirujuk)***
Koh Lai Kiow v. Low Nam Hui [2005] 3 CLJ 139 HC ***(diikuti)***
Low Pek Nai v. Koh Chye Guan [1995] 2 CLJ 110 HC ***(dirujuk)***
Re Balasingam & Paravathy [1970] 2 MLJ 74 ***(dirujuk)***
Sinnakaruppi Periakaruppan v. Bathumalai Krishnan [2001] 2 CLJ 435 HC ***(dirujuk)***
Tam Lye Chian v. Seah Heng Lye [1998] 8 CLJ 614 HC ***(dirujuk)***
Amarapathi Periasamy v. Muniandy [2005] 4 CLJ 264 ***(dirujuk)***

Perundangan yang dirujuk:
Law Reform (Marriage and Divorce) Act 1976, ss. 88, 90

Bagi pihak plaintif - Cik Chandrika (K Bharathi bersamanya; T/n Anandan Krishnan & Partners
Bagi pihak defendan - S Ramesh; T/n Rastam Singa & Co

Dilaporkan oleh Usha Thiagarajah

PENGHAKIMAN

Azahar Mohamed PK:

[1] Permohonan plaintif di lampiran 2 adalah bagi mendapatkan perintah-perintah seperti yang berikut:

1. Bahawa kesemua hak penjagaan, kawalan dan pemeliharaan (care, custody and guardianship) ke atas kanak-kanak bernama Piraveen diberikan dan/atau diletakkan kepada plaintif;

2. Bahawa plaintif diberikan hak kastodi, pemeliharaan dan kawalan kanak-kanak bernama Piraveen dengan akses yang berpatutan kepada defendan;

3. Bahawa defendan, ejen dan/atau orang suruhannya dilarang dan ditegah daripada memukul, mengugut, mengganggu dan/atau dengan apa cara lain sekalipun menggunakan sebarang fizikal, mental dan memaksa penerimaan kehadirannya ke atas diri plaintif dan/atau atas kanak-kanak bernama Piraveen;

A 4. Bahawa plaintif memohon agar defendan membayar maintenance bagi kanak-kanak sahaja bagi jumlah RM800 sehingga anak tersebut berumur 18 tahun atau sehingga anak tersebut tamat pelajaran sehingga peringkat Universiti;

B 5. Kos permohonan ini ditanggung oleh kedua-dua pihak;

6. Lain-lain perintah dan/atau relif yang difikirkan wajar dan adil oleh mahkamah yang mulia ini.

[2] Di perbicaraan pada 26 Januari 2006 peguam bagi plaintif C memaklumkan bahawa pihak plaintif tidak berhajat untuk meneruskan dengan perintah keempat, iaitu pemohonan bagi nafkah untuk Piraveen.

[3] Latar belakang fakta kes ini yang tidak di pertikaikan yang D membawa kepada permohonan di lampiran 2 adalah seperti yang berikut. Pada 30 Ogos 2001 plaintif dan defendan telah melangsungkan perkahwinan dalam satu upacara adat di sebuah kuil yang di kenali sebagai Kuil Subramaniar di Chaah, Segamat, Johor. Walau bagaimanapun perkahwinan mengikut adat E tersebut tidak pernah didaftarkan di bawah Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 (Akta 1976). Hasil daripada perkahwinan adat tersebut, plaintif dan defendan mendapat seorang anak lelaki bernama Piraveen yang dilahirkan pada 8 November 2002 dan sekarang berumur 2 F tahun 10 bulan.

[4] Undang-undang adalah jelas. Menurut undang-undang, perkahwinan ikut adat di antara plaintif dan defendan di anggap tak sah dan wajar tidak diiktirafkan kerana ianya tidak G didaftarkan di bawah Akta 1976. Dari itu, bagi kes di hadapan saya ini, akibat undang-undang, Piraveen yang dilahirkan dari hasil perhubungan di antara plaintif dan defendan adalah di anggap anak tak sah tarafnya.

[5] Dengan yang demikian, persoalan utama dalam kes di H hadapan saya ini ialah samada mahkamah mempunyai bidangkuasa atau tidak di bawah Akta Penjagaan Kanak-Kanak 1961 (Akta 1961) untuk mendengar permohonan plaintif untuk perintah hak penjagaan dan pengawalan ke atas Piraveen, seorang kanak-kanak yang tak sah tarafnya.

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[6] Peguam bagi plaintif bergantung kepada Akta 1961 dan antara lain, kes-kes *Tam Lye Chian v. Seah Heng Lye* [1999] 8 CLJ 614, *Low Pek Nai v. Koh Chye Guan @ Koh Chai Guan* [1995] 2 CLJ 110 dan *Sinnakaruppi a/p Periakaruppan v. Bathumalai a/l Krishnan* [2001] 2 CLJ 435 untuk menyokong hujahannya bahawa mahkamah mempunyai bidangkuasa di bawah Akta 1961 untuk membuat perintah hak penjagaan dan pengawalan ke atas kanak-kanak yang tak sah tarafnya.

[7] Pada hemat saya Akta 1961 tidak terpakai kepada anak tak sah taraf. Dan pada hemat saya juga, mahkamah tidak mempunyai bidangkuasa untuk memberi perintah penjagaan, kawalan dan pemeliharaan di bawah Akta 1961 ke atas kanak-kanak yang tak sah tarafnya. Alasannya, telahpun saya huraikan di dalam kes *Koh Lai Kiow v. Low Nam Hui* [2005] 3 CLJ 139 di mana di halaman 143-144 saya menyatakan seperti yang berikut:

> I do not wish to embark in any analysis of the relevant provisions in the 1961 Act in view of the decided cases on this subject. The relevant provisions have been discussed at length and with great care by the learned judges. It seems that the first reported local case on the question whether the 1961 Act applies to illegitimate children was *Re Balasingam & Paravathy* [1970] 2 MLJ 74. The following passages in the judgment of Raja Azlan Shah J (as His Majesty then was) at page 75 of the report is of relevance:
>
> > The Guardianship of Infants Act, 1961 does not seem to provide for illegitimate children. The remarkable absence of any reference to illegitimate children other than in the abovementioned section 1(2)(a) would seem to favour the proposition that Parliament intended the Act not to apply to illegitimate children. This proposition is fortified by respondent's arguments on the correct construction of the words "father" and "mother" in sections 5 and 6. Furthermore, adopting the approach taken by Viscount Simonds in *Galloway v. Galloway* it is safer to say that "infant" means legitimate infant unless there is some repugnancy or inconsistency and not merely some violation of the moral obligation or of a probable intention resulting from so interpreting the word. Accordingly, since none of the words "father", "mother" or "infant" can be construed to mean illegitimate infant or the *de facto* parents of illegitimate children, it must be concluded that the Act does not apply to illegitimate children.

Learned counsel for the plaintiff in his written submission dated 19 April 2005 has referred me to two cases to support his argument that the 1961 Act applies to illegitimate children. The first is the case of *Low Pek Nai v. Koh Chye Guan @ Koh Chai Guan* [1995] 2 CLJ 110 where Hishamudin J found himself in disagreement with the views expressed by the learned judge in *Re Balasingam (supra)* and held that 1961 Act applied also to illegitimate children. In this regard, Zulkefli Ahmad Makinudin JC (as he then was) in *Khor Liang Keow v. Tee Ming Kook* [1996] 2 CLJ 631 disagreed with Hishamuddin J in the case of *Low Pek Nai (supra)* and agreed with the learned judge in *Re Balasingam (supra)*. At page 638 of the report Zulkefli Ahmad Makinuddin JC (as he then was) said:

> Saya berpendapat dalam kes ini timbul persoalan samada Mahkamah mempunyai bidangkuasa atau tidak di bawah Akta Penjagaan Kanak-Kanak 1961 untuk mendengar permohonan untuk perintah hak penjagaan dan pengawalan ke atas kedua-dua anak yang tak sah taraf ini. Dalam hal ini peguam plaintif telah merujuk kepada saya kes *Low Pek Nai v. Koh Chye Guan @ Koh Chai Guan* [1995] 2 CLJ 110 dimana Yang Arif Hakim Mohd. Hishamudin telah memutuskan bahawa Akta Penjagaan Kanak-Kanak 1961 terpakai kepada anak tak sah taraf dan Mahkamah mempunyai bidangkuasa untuk mendengar permohonan ibu sebenar untuk hak penjagaan dan pengawalan ke atas anak tak sah taraf tersebut. Yang Arif Hakim Mohd. Hishamudin dalam penghakimannya telah merujuk kepada peruntukan s. 3 Akta tersebut yang menyatakan bahawa peruntukan tersebut membolehkan Dewan Undangan Negeri meluluskan pemakaian Akta tersebut kepada kanak-kanak Muslim tidak kira samada anak itu sah taraf atau tidak sekiranya ianya tidak bertentangan dengan Undang-Undang Islam. Yang Arif Hakim tersebut menyatakan jika peruntukan ini membolehkan pemakaian terhadap kanak-kanak Muslim maka Akta tersebut juga adalah terpakai kepada semua kanak-kanak secara am samada ianya sah taraf atau tidak. Dengan rasa penuh hormat kepada pandangan Yang Arif Hakim Mohd. Hishamudin ini dalam isu bidangkuasa Akta tersebut bagi mendengar permohonan penjagaan anak tak sah taraf, saya lebih cenderung berpegang kepada pandangan yang telah diberi oleh Yang Arif Hakim Raja Azlan Shah (DYMM Paduka Sen pada masa itu) dalam kes *Re Balasingam (supra)* dimana telah diputuskan bahawa Akta Penjagaan Kanak-Kanak 1961 tidak terpakai kepada anak tak sah taraf.

And, later still he said this:

> Saya berpendapat adalah jelas Parlimen tidak berhasrat Akta Penjagaan Kanak-Kanak 1961 tersebut terpakai kepada anak tak sah taraf dengan tiada rujukan secara langsung terhadapnya dalam Akta tersebut.

I would respectfully agree with the reasoning stated therein by the learned judge in *Khor Liang Keow (supra)*.

[8] Di dalam kes *Koh Lai Kiow v. Low Nam Hui* itu saya juga telah menyentuh kes yang di rujuk oleh peguam bagi plaintif iaitu kes *Sinnakaruppi Periakaruppan v. Bathumalai Krishnan*. Di halaman 145-146 kes *Koh Lai Kiow* saya menyatakan seperti yang berikut:

> This brings me to the case of *Sinnakaruppi Periakaruppan v. Bathumalai Krishnan* [2001] 2 CLJ 435, which has been drawn to my attention by learned counsel for the plaintiff. In that case the plaintiff is the natural mother and the defendant is the natural father of the illegitimate child. The plaintiff is seeking only guardianship of the child. She is not asking for maintenance of the child. Jeffrey Tan J overruled the defendant's preliminary objection that the plaintiff must proceed by way of wardship proceedings. The learned judge at page 439 of the report said:
>
> > Evidently, there is no unanimity of views. Only one case said that the GIA is applicable to illegitimate children. And only one case said that the mother seeking custody of her illegitimate children should do so by way of wardship proceedings. Still the preponderant view is that the court has jurisdiction under s. 24 of the CJA to grant custody and guardianship of both legitimate or illegitimate infants, regardless of the GIA. It does not appear therefore, that the present plaintiff must proceed by way of wardship proceedings. Indeed, in the light of the latest amendments of the GIA (see Guardianship of Infants (Amendment) Act 1999 effective 1 October 1999), and the substitution of the former s. 5 by an altogether new s. 5 providing for equality of parental rights, there is less reason to doubt that the GIA in present form does not apply to illegitimate children. Presently, the position in England is that "the statutory provisions relating to orders for custody of, and rights of access to, a minor on the application of a mother or father apply in relation

> to as minor who is illegitimate as they apply in relation to a minor who is legitimate ... (*Halsbury's Law of England*, 4th edn, para 548). Perhaps it would require further study, but *Low Pek Nai v. Koh Chye Guan* might have fortuitously and correctly stated the law. In any event, s. 24 of the CJA confers jurisdiction on the court to appoint the control guardians of infants and generally over the person and property of infants, a jurisdiction that is not only restricted to cases within the GIA. A wardship proceeding is to protect a minor. Also in wardship proceedings, a guardian may be appointed. This proceedings, call it what you will, would achieve the same objects. It would not serve any purpose to uphold the present objection.

Now, s. 5 of the 1961 Act before the amendment reads as follows:

Subject to sec. 10, the father of an infant shall be the guardian of the infant's person and property:

> Provided that the Court or a Judge may make such order as it or he thinks fit regarding the custody of the infant, and the right if access thereto of either parent, and may vary or discharge such order at anytime on the application or either parent.

With effect from 1 October 1999, the above s. 5 was amended and it now reads as follows:

> (1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother an father shall be equal.
>
> (2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.

With respect I am unable to see that the new provisions of the 1961 Act on equality of parental rights support the contention that the 1961 Act applies to illegitimate children. I cannot find anything in the new provisions, which lead me to the view that the 1961 Act applies to illegitimate children.

[9] Saya ingin menyatakan di sini bahawa Akta 1976 juga tidak terpakai kepada prosiding kes di hadapan saya ini memandangkan perkataan "anak" di dalam s. 88 dan 90 Akta 1976 merujuk kepada 'anak' dari perkahwinan yang didaftarkan di bawah Akta tersebut. Undang-undang tentang perkara ini telah di jelaskan di dalam kes *Amarapathi Periasamy v. Muniandy* [2005] 4 CLJ 264 di mana Mohd Ghazali Yusoff HMR sewaktu menyampaikan keputusan Mahkamah Rayuan telah berkata seperti yang berikut di halaman 269:

> In his judgment, in relation to s. 88 of the 1976 Act, the learned judge said:
>
> > In relation to the Law Reform (Marriage and Divorce) Act 1976, it is axiomatic that it has been enacted to provide for the law relating to divorce and matrimonial proceedings, including ancillary relief such as the custody and protection of a 'child' which has been defined as 'child of the marriage' under the age of 18 years; see s. 2 thereof. Section 88 thereof confers upon the court to make an order for custody, where relevant, ...
> >
> > In my view, s. 88 applies only where the parents of the child have commenced matrimonial proceedings including a prayer for an order for custody of a child of their marriage under the 1976 Act. However, the instant proceedings do not concern any matrimonial proceedings based on any matrimonial dispute. In the circumstances, I do not see how the facts of the instant application would fall under s. 88.
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> Before us, the appellant's counsel again referred to s. 88 of the 1976 Act which reads:
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> 88. Power for court to make order for custody.
>
> (1) The court may at any time by order place a child in the custody of his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.
>
> (2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard;

A (a) to the wishes of the parents of the child; and

(b) to the wishes of the child, where he or she is of an age to express an independent opinion.

(3) There shall be a rebuttable presumption that it is for the
B good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

C (4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in custody of the same person but shall consider the welfare of each independently.

D The appellant's counsel also referred to s. 90 of the 1976 Act which reads:

90. Declaratory order as to unfitness of parent to have custody.

E (1) The court may, when granting a divorce or judicial separation or at any time thereafter, on the application of the father or the mother of any child of the marriage, make an order declaring either parent to be a person unfit to have the custody of the child and may at any time rescind any such order.

F (2) Where an order has been made under subsection (1), and has not been rescinded, the parent thereby declared to be unfit shall not, on the death of the other person, be entitled to the custody of such child unless the court otherwise orders.

G **[10]** Selanjutnya Hakim Yang Arif itu di halaman 273 telah menambah kata seperti yang berikut:

H The 1976 Act, according to its preamble, is "An Act to provide for monogamous marriages and the solemnization and registration of such marriages; to amend and consolidate the law relating to divorce; and to provide matters incidental thereto." What is obvious to us is that the word "child" appearing in ss. 88 and 90 refers to a child of the marriage.

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[11] Berbalik kes di hadapan saya ini, sungguhpun saya telah memutuskan bahawa Akta 1961 dan Akta 1976 tidak terpakai kepada kanak-kanak yang tak sah taraf namun ini tidak bermakna plaintif langsung tidak mempunyai remedi. Pada hemat saya, plaintif masih boleh memulakan prosiding wardship bagi membolehkan mahkamah memutuskan permohonan plaintif sebagai ibu biologi Piraveen untuk mendapatkan hak penjagaan. Dengan hormatnya saya bersetuju dengan pandangan yang telah diberi oleh Raja Azlan Shah H (DYMM Paduka Seri pada masa tersebut) dalam kes *Re Balasingam & Paravathy* di mana di halaman 76 Hakim Yang Arif itu berkata seperti yang berikut:

> It would thus seem that neither local legislation or case law has altered the common law position on this point. The net result is that this court has no jurisdiction to entertain this application for custody by the *de facto* mother. However, it is not correct to say that as a result, the applicant has no remedy.
>
> She can still institute wardship proceedings. The application is dismissed with costs.

[12] Dengan yang demikian, berdasarkan alasan-alasan yang telah saya huraikan di atas, permohonan plaintif di lampiran 2 ditolak dengan kos. Demi keadilan pihak plaintif dan defendan serta Piraveen, kebebasan dengan ini di beri kepada plaintif untuk memulakan prosiding wardship bagi membolehkan mahkamah memutuskan permohonan plaintif sebagai ibu biologi untuk mendapatkan hak penjagaan Piraveen dan relief-relief sampingan lain yang berkaitan.